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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 613

THEODORE W. BERENSON, ET AL.,
Petitioners,

v.

THOMAS N. MUCHARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

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LIST OF AUTHORITIES

Cases

	Pages
Bogle v. Landa, 127 Tex. 317, 94 S.W.2d 154 (1936)	5
Hoffman v. Blaski, 363 U.S. 335	2,3,4,5
Sullivan v. Behimer, 363 U.S. 335	2,3,4,5

Other Authorities

Rule 41(a), Federal Rules of Civil Procedure	2,3,4
28 U.S.C. Sec. 1404a	2,4
Art. 1995, Vernon's Texas Statutes	4,5

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Opinions Below

The opinion of the Court of Appeals is reported at 307 F. 2d 368. There was no written opinion of the District Court.

Jurisdiction

The petition adequately sets forth the jurisdictional requisites.

Question Presented

Whether, where a cause has been improperly transferred to a District in which it could not have been brought, a plaintiff may in accordance with Rule 41 (a), Federal Rules of Civil Procedure, dismiss without prejudice and re-file in the District having venue of the cause.

Statute Involved

The petition sets forth the statute involved on page 2.

Statement

Respondent's prior contract suit against petitioners was removed to the United States District Court for the Western District of Texas and upon petitioners' motion was transferred to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. Sec. 1404a. (R. 7, 8, 28). Respondent opposed the transfer and applied for a writ of mandamus or prohibition to the United States Court of Appeals for the Fifth Circuit which was not granted. (R. 31). Subsequent to transfer this Court announced its decision in *Hoffman v. Blaski*, 363 U.S. 335, and *Sullivan v. Behimer*, 363 U.S. 335. Respondent then dismissed without prejudice the action then pending in the Southern District of New York and re-filed the case in State Court in Texas. Petitioners again removed and, based upon a plea of *res judicata*, obtained a dismissal on the ground that the order transferring the prior case to New

York barred prosecution of the subsequent case in Texas.

Argument

I.

The Present Case Does Not Merit Review By This Court

Right or wrong (and respondent can demonstrate that it is clearly right), the decision below is on a narrow point that will not again arise and as to which petitioners' position here is unbelievably technical. Apparently conceding that respondent could have obtained a re-transfer of the former case by appropriate motion, petitioners contend that he could not accomplish exactly the same end by a voluntary dismissal and a re-filing of the case in Texas. The transfer of the former case was clearly beyond the power of the District Court under the decision of this Court in *Hoffman v. Blaski* and *Sullivan v. Behimer, supra.* Since petitioners had filed no answer in the former case respondent voluntarily dismissed it without prejudice pursuant to Rule 41 (a), Federal Rules of Civil Procedure. Presumably District Courts will in the future adhere to the rule established in the *Blaski* and *Sullivan* decisions and will not transfer cases to districts in which they could not have been brought originally. Thus it is unlikely that it will again be necessary for a plaintiff to decide whether he should move the transferee Court to re-transfer or dismiss and re-file in order to return the cause to its proper forum. The decision

below settles a question involving the mechanics of a re-transfer of a cause erroneously transferred to an improper forum. Such is not likely to happen again in view of the holdings in *Blaski* and *Sullivan* and this Court's decision of the same question might satisfy petitioners' curiosity but is not likely to answer any problems, if such exist, unanswered in *Blaski* and *Sullivan*.

II.

The Decision Below Is Clearly Correct

Petitioners contend that the transfer in the former case is *res judicata* of something but of just what they do not say. At most the transfer determines that it is more convenient for this cause to be heard in New York than in Texas. It does not determine that the cause can not be heard in Texas. The New York Court is unavailable to respondent since not all of petitioners are subject to process there and since that Court does not have venue of the cause. Thus, if petitioners should prevail in their contention, respondent would be denied his day in court, although his voluntary dismissal was without prejudice and in strict compliance with Rule 41(a), Federal Rules of Civil Procedure.

Petitioners contend that Federal Courts in construing and applying the applicable Federal Statute, 28 U.S.C., Sec. 1404(a), in a diversity case, should be controlled by State Court decisions construing and applying a materially different State Statute, Art. 1995, Vernon's Texas Statutes. Such

a rule would not tend to create uniformity in the construction and application of the Federal Statute, to say the least. Even if the Federal Statute were identical to the State Statute, surely the Federal Court would be free, even in a diversity case, to determine as a matter of Federal law whether the former transfer barred a re-filing of the case in the same court. However, there is indeed a material difference in the statutes. The Federal Statute presupposes two courts each with the power to hear the cause, one of which is a more convenient court. The Federal Courts are given a power to transfer that is discretionary.

Article 1995, Vernon's Texas Statutes, permits no discretion. If no exception set forth in the article is applicable and the article is properly invoked the Texas Court must transfer the case to the County in which the defendant resides. Rule 89, Texas Rules of Civil Procedure. If the defendant's plea of privilege to be sued in the County of his residence is not controverted the Texas Court is powerless to do anything but transfer the case. *Bogle v. Landa*, 127 Tex. 317, 94 S.W.2d 154 (1936). In Texas the issue determined on a plea of privilege is whether the Court in which the suit is pending has the power to hear the cause. Under the Federal Statutes the issue is in which of two Courts is it more convenient to hear the cause. The decision in the former case may have determined that it was more convenient to hear the cause in New York, but the Courts there are, under the decision of *Blaski* and *Sullivan*, unavailable to respondent. That the Federal Court in

Texas is less than convenient surely would not justify a dismissal of respondent's case with the consequence that it can not be heard in any Court.

Conclusion

For the reasons stated respondent respectfully submits that the petition for a writ of certiorari should be denied.

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I, Coleman Gay, certify that I am a member of the Bar of the Supreme Court of the United States, and one of the attorneys of record for respondent. I further certify that copies of the foregoing Brief of Respondent in Opposition to Petition for Certiorari were delivered to Messrs. Thomas Gibbs Gee and Robert J. Hearon, c/o Messrs. Graves, Dougherty, Gee and Hearon, Capital National Bank Building, Austin, Texas.